



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2012-0650; FRL-9905-54-Region 5]

**Approval and Promulgation of Air Quality Implementation Plans;
Indiana; Consent Decree Requirements**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a portion of Indiana's construction permit rule for sources subject to the state operating permit program regulations.

These provisions authorize the state to incorporate terms from Federal consent decrees and Federal district court orders into these construction permits. EPA is also approving public notice requirements for these permit actions. These rules will help streamline the process for making Federal consent decree and Federal district court order requirements permanent and Federally enforceable.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2012-0650. All documents in the docket are listed on the www.regulations.gov web site. Although

listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 AM to 4:30 PM, Monday through Friday, excluding Federal holidays. We recommend that you telephone Sam Portanova, Environmental Engineer, at (312) 886-3189 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Sam Portanova, Environmental Engineer, Air Permits Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-3189, portanova.sam@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

- I. What is EPA Addressing in this Document?
- II. What is EPA's Response to Adverse Comments?

III. What Action is EPA Taking?

IV. Statutory and Executive Order Reviews.

I. What is EPA Addressing in this Document?

On March 15, 2013, EPA published a direct-final rule approving 326 IAC 2-7-10.5(b) and 326 IAC 2-7-10.5(k) as revisions to Indiana's State Implementation Plan (SIP) (78 FR 16412). This rule revision authorizes Indiana to issue construction permits to sources subject to the state operating permit program regulations at 40 CFR part 70 (part 70 sources) that include requirements from Federal district court orders that adjudicate violations and Federal consent decrees. Permits incorporating these requirements are issued to sources that are subject to title V of the Clean Air Act (CAA). This rule revision also requires public notice procedures for these permitting actions.

On the same date, EPA also proposed to approve the revisions (78 FR 16449). On May 6, 2013, in a separate action, we withdrew the direct final rule because we received adverse comments (78 FR 26258). The proposed approval remained in effect. Today, we are responding to those comments and taking final action to approve Indiana's SIP revision request.

II. What is EPA's Response to Adverse Comments?

EPA received one set of adverse comments on the March 15, 2013, proposed approval of this Indiana rule. EPA's response to these comments is as follows:

Comment: Federal consent decrees are not applicable requirements under title V and should not be incorporated into title V permits. EPA should equivocally state whether or not consent decree requirements are title V applicable requirements as there appears to be conflicting guidance on this point.

Response: The title V issue raised by this comment is not directly related to this action because this action authorizes Indiana to incorporate consent decree terms in construction permits, not title V permits. However, if consent decree terms are incorporated into a construction permit, there are consequences under title V. The definition of "applicable requirement" in 40 CFR 70.2 includes "[a]ny term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I of the Act...." These construction permits are issued pursuant to programs approved by EPA under title I of the CAA. Thus, once the title I permits are issued, the terms, including terms reflecting requirements from Federal district court orders and Federal consent decrees, are "applicable requirements" under this provision of the title V regulations and must be included

in the source's title V permit. See also 326 IAC 2-7-1(6)).

Comment: Not all consent decree requirements are permanent and thus some should expire at the time of consent decree termination. It should also be noted that requirements that become "permanent" under title V are not really permanent - they can be changed or modified by going through a new permit application.

Response: For the reasons discussed above, the title V issue raised by this comment is not directly related to this action. The rule does not require the Indiana Department of Environmental Management (IDEM) to incorporate all consent decree requirements into construction permits, only "control requirements and emission limitations." However, some requirements are intended to remain in effect after the consent decree terminates. Specifically, some consent decrees require a source to establish emission limitations and control requirements on a permanent basis (e.g., through a SIP revision or a construction permit).

Comment: Not all consent decree requirements are necessarily instances of noncompliance with existing requirements. If some consent decree requirements are required to be incorporated into title V permits and/or construction permits, the consent decree requirements can be included in a

permit application as a compliance schedule for the alleged non-compliance cited in the consent decree. There is no need for this additional authority.

Response: For the reasons discussed above, the title V issue raised by this comment is not directly related to this action. However, once the title I permits are issued, the terms are "applicable requirements" under subparagraph (2) of the definition of "applicable requirement" in 40 CFR 70.2 and must be included in the source's title V permit. Also, the rule does not require IDEM to incorporate all consent decree provisions into the construction permits, only those relating to control requirements and emission limitations.

Comment: It is also curious why the authority is limited to Federal consent decrees and does not also include state agreed orders.

Response: The CAA requires SIPs to contain enforceable limitations. See Section 110(a)(2)(A). It does not address the Federal enforceability of state agreed orders. As such, it is not necessary to establish a Federally enforceable requirement pursuant to title I of the CAA for state orders.

Comment: Why is there a need for additional public comment for incorporating Federal consent decree requirements into title V permits? There is ample time for the public to comment on

Federal consent decrees after the decree is lodged before it is entered by the court. Any requirements that are required to be put into a permit should be done as an administrative amendment without any comment by the public or EPA. Why create additional un-needed bureaucracy?

Response: For the reasons discussed above, the title V issue raised by this comment is not directly related to this action because this action authorizes Indiana to incorporate consent decree terms in construction permits, not title V permits. The intent of this rule is to lessen the bureaucratic burden on the state with regards to implementing consent decree requirements. The method IDEM currently uses for establishing consent decree requirements as permanent and Federally enforceable is to adopt them as source-specific SIP requirements. This process is more resource-intensive and time consuming than the state construction permit process provided for in 326 IAC 2-7-10.5(b).

III. What Action is EPA Taking?

EPA is approving Indiana's source construction permit rule provisions applicable to Part 70 sources at 326 IAC 2-7-10.5(b) and 326 IAC 2-7-10.5(k). These provisions authorize the state to incorporate terms from Federal consent decrees or Federal

district court orders into these construction permits and provide a public notice requirement for these actions.

IV. Statutory and Executive Order Reviews.

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian

country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it

extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subject in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: January 2, 2014.

Susan Hedman,
Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. In § 52.770 the table in paragraph (c) is amended by adding a new entry in "Article 2. Permit Review Rules" for "Rule 7.

Part 70 Permit Program" in numerical order to read as follows:

§ 52.770 Identification of plan.

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(c) * * *

EPA-APPROVED INDIANA REGULATIONS

Indiana citation	Subject	Indiana effective date	EPA approval date	Notes
* * *	* * *	* * *		
Article 2. Permit Review Rules				
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Rule 7. Part 70 Permit Program				
2-7-10.5	Part 70 permits; source modifications	03/7/2012	[INSERT THE DATE OF PUBLICATION IN THE FEDERAL REGISTER], [INSERT PAGE NUMBER WHERE THE DOCUMENT BEGINS]	(b) and (k) only.
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